

REMARKS

Claims 2-13, 17-19, and 22-43 are pending in the present application. Claim 44 has been cancelled herein.

Election of one of the following species is required by the Examiner under 35 U.S.C. § 121. More specifically, the Examiner has required election in the present application among:

The following species of secondary plant substances in claims 2 and 3: carotenoids, phytosterols, saponins, polyphenols, flavonoids, terpenes, phytoestrogens, sulfides, and phytic acid; and

The following species of secondary plants substances in claim 44: tannin, pectin, and carotenoid.

The Examiner has also required election in the present application among skin irritation, sunburn, cellulitis, wrinkles, acne, neurodermatitis, ozone damage, burns, thickenings, edema, hematomas, hemorrhoids, skin cancer, herpes, or microcirculation.

For the purpose of examination of the present application, Applicant elects, with traverse, polyphenols as a secondary plant substance and cellulitis for the method of treatment claims. The claims encompassing the elected species include claims 2-13, 17-19, and 22-40.

Applicant respectfully traverses the required election. For one of the elections, the Examiner combines the subject matter of claims 40 and 43. Applicant notes that claim 40 contains a group of several disorders but claim 43 points to a method of increasing microcirculation of cells, which is not a disorder.

The Examiner also alleges that the species are independent or distinct because claims to the different species recite the mutually exclusive characteristics of such species and that these species are not obvious variants of each other based on the current record.

Applicant respectfully traverses the Examiner's interpretation. As repeatedly indicated in Applicant's previous replies, the term "secondary plant substance" is an umbrella term which covers the sub-assembly groups consisting of carotenoids, phytosterols, saponins, polyphenols, flavonoids, terpenes, phytocestrogens, sulfides, and phytic acid, as required by claims 2 and 3. Applicant emphasizes that this is similar, for example, to vitamins, wherein the term "vitamin" is the umbrella term and the different vitamins are the sub-assembly groups. In that case, one of ordinary skill in the art would select a vitamin such that the intended effect is achieved. The table of Watzl, which was filed with the Amendment of August 8, 2007, also confirms that the term "secondary plant substance" is an umbrella term. Applicant emphasizes, however, that the Watzl reference deals with nutrition and that there is nothing in this reference which points to the use of secondary plant substances in a preparation for topical application as required by the present application invention.

As already indicated in Applicant's previous replies, the present invention claims that secondary plant substances can be used in combination with the other components, as required by claims 2 and 3, for a preparation for topical application. By this inventive preparation, the microcirculation of the cells can be improved. By this improvement of the microcirculation, not only the metabolism of the cells is improved but also a multiplicity of disorders can be treated. The desired effects are provided by the respective secondary plant substance(s) used. The inventive preparation for topical application is particularly useful for the treatment of the disorders as cited in claim 40. That is, the present invention opens up a whole new field. Therefore, the Applicant is entitled to more generality in the claims than one which is concerned with advances in a known technology. It should be emphasized that a fair statement of claims is one which is not so broad that it goes beyond the invention nor yet so narrow as to deprive the Applicant of a just reward for the disclosure of his invention. The Applicant should be allowed to cover all obvious modifications of equivalence to and uses of that which he has described. In particular, if the specification describes that all the variants covered by the claims have the properties or uses the Applicant ascribes to them in the description, he should be allowed to draw his claims accordingly. In the claims, each of the sub-assembly groups can be used variably as a

single group or in combination thereof and can be used in a detailed manner so that they can fulfill their desired purposes. Therefore, the generic claims 2, 3, and 40 are absolutely justified.

Moreover, MPEP 803 lists two criteria for a proper requirement for restriction between patentably distinct species. First, the inventions must be independent or distinct as claimed. Applicant has presented arguments regarding this criterion above. Second, there must be a serious burden on the examiner if restriction is required.

Applicant respectfully asserts that no such burden exists. The Examiner has been previously presented with the group of secondary plant substances of claims 2 and 3 as well as the group of disorders of claim 40. Presumably, the search for all members of these groups has already been conducted. Thus, the second criterion for a proper restriction requirement has not been met.

Rather than imposing a restriction requirement, the proper approach in this instance is for the Examiner to require an election of species for initial examination and then, if the elected species is found patentable, the Examiner should move on to examine additional species to determine if a generic claim is allowable. Applicant requests that the Examiner undertake this proper approach.

For the reasons given above, the requirement for election should be withdrawn by the Examiner.

Should there be any outstanding matters that need to be resolved in the present application, the Examiner is respectfully requested to contact Mark J. Nuell, Registration No. 36,623 at the telephone number of the undersigned below, to conduct an interview in an effort to expedite prosecution in connection with the present application.

- Attached is a Petition for Extension of Time.
- Attached hereto is the fee transmittal listing the required fees.

If necessary, the Commissioner is hereby authorized in this, concurrent, and future replies, to charge payment or credit any overpayment to our Deposit Account No. 02-2448 for any additional fees required under 37 C.F.R. § 1.16 or under § 1.17; particularly, extension of time fees.

Dated: February 19, 2008

Respectfully submitted,

By Mark J. Nuell
Mark J. Nuell
Registration No.: 36,623
BIRCH, STEWART, KOLASCH & BIRCH, LLP
12770 High Bluff Drive
Suite 260
San Diego, CA 92130
(858) 792-8855
Attorney for Applicant